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IN THE

Supreme Court of the United States

OFFICERS P. EDGELL and B. HONSOWETZ,

Petitioners,

v.

SCOTT McKENNA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS IMPLICATED WHEN LAW ENFORCEMENT OFFICERS ARE ACTING AS FIRST RESPONDERS?

II. WHETHER LAW ENFORCEMENT OFFICERS, WHO ARE FIRST RESPONDERS TO A MEDICAL EMERGENCY, ARE ENTITLED TO QUALIFIED IMMUNITY?

III. WHETHER AN INDIVIDUAL CAN BE SEIZED WITHIN THE PARAMETERS OF THE FOURTH AMENDMENT WHERE THE INDIVIDUAL IS UNCONSCIOUS, IN AN ALTERED STATE OF CONSCIOUSNESS, OR OTHERWISE UNAWARE OF THE CIRCUMSTANCES, AND WHERE NO SHOW OF AUTHORITY HAS BEEN DEMONSTRATED OR SUBMITTED TO?

PARTIES TO THE PROCEEDING

Petitioners are Officers P. Edgell and B. Honsowetz. They were Defendants in the District Court and Appellants in the Court of Appeals. They bring this action on their own behalf and on behalf of all law enforcement officers similarly situated.

Respondent is Scott McKenna. He was Plaintiff in the District Court and Appellee in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Officers P. Edgell and B. Honsowetz, hereby petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, filed on August 17, 2010.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Michigan granting in part and denying in part Defendants' Motion for Summary Judgment, entered on October 19, 2005, is reproduced at Appendix D and is not otherwise published. The Opinion of the District Court denying Defendants' Second Motion for Summary Judgment, entered on September 21, 2007, is reproduced at Appendix C and is not otherwise published. The Opinion of the District Court denying Defendants' Motion for Judgment Notwithstanding the Verdict and New Trial and granting Remittitur, entered on July 21, 2008, is reproduced at Appendix B and is not otherwise published. The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at *McKenna v. Edgell*, 617 F.3d 432 (6th Cir. 2010) and is also reproduced at Appendix A.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit rendered its decision on August 17, 2010, and denied rehearing *en banc* on October 26, 2010. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution and Title 42, Section 1983 of the United States Code.

The Fourth Amendment to the United States Constitution provides:

> Unreasonable searches and seizures.
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

> action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

I. Factual Background

This case arose on March 18, 2004 when the City of Royal Oak Police Dispatcher received a 911 call regarding a medical emergency at the residence of Scott McKenna (hereinafter "Plaintiff" or "Respondent"). Royal Oak Police Officers, P. Edgell and B. Honsowetz (collectively "Defendants" or "Petitioners" or "the Officers"), were dispatched and arrived on the scene as first responders.

When the Officers arrived at Plaintiff's residence, they attempted to rouse Plaintiff by calling to him and by shaking him. Plaintiff opened his eyes and began to sit up in bed. When the Officers asked Plaintiff if he was alright, Plaintiff was unresponsive and it did not appear that he was registering what the Officers were saying. In a quest to determine the cause of Plaintiff's behavior, Officer Honsowetz pulled Plaintiff's daughter aside and asked her whether her father had taken any drugs, whether and where there were any medicines or drugs in the house, and whether anything similar had previously occurred.

When Plaintiff attempted to stand, Officer Edgell tried to keep him calm by placing his hand on Plaintiff's shoulder and verbally reassuring Plaintiff that he would be okay. At this point, Plaintiff began to flail in an aggressive manner.

As Plaintiff's struggling increased, the Officers held Plaintiff on the bed. To the extent that Plaintiff's struggling was aggressive in nature, the Officers felt that they needed to handcuff him for his own safety and for their own. Amidst the commotion, the fire department emergency medical personnel arrived, and assumed the role of primary caregivers to Plaintiff. Plaintiff was placed in an ambulance and transported to the hospital. The Officers then searched the bathroom and bedroom areas in efforts to discover the cause of Plaintiff's behavior, as they did not know whether Plaintiff was suffering from a seizure or if his behavior was precipitated by drugs or alcohol.

Plaintiff conceded that he has no recollection of the events that transpired on March 18, 2004. Plaintiff merely recalls going to bed the night before, and then waking up in the hospital. He nevertheless brought an action against the City of Royal Oak and the Royal Oak Police Officers who responded to the 911 call for help.

II. Procedural History

Plaintiff filed his Complaint in the United States District Court for the Eastern District of Michigan on October 15, 2004. Plaintiff alleged that the Officers violated his Fourth Amendment rights during the course of rendering medical aid to Plaintiff, in violation of 42 U.S.C. § 1983. He also brought state law claims of assault and battery, false arrest, false imprisonment, and slander. On December 16, 2004, the state law claims were remanded to the Oakland County Circuit Court, leaving Plaintiff's § 1983 claim as the only remaining issue before the District Court.

On August 15, 2005, Defendants filed a Motion for Summary Judgment, which was granted in part and denied in part by the District Court on October 19, 2005. (App. D). Specifically, the District Court granted Defendants' motion to dismiss Plaintiff's municipal liability claim against the City of Royal Oak, but denied Defendants' motion to dismiss Plaintiff's Fourth Amendment claims against the individual Officers and Defendants' qualified immunity claims. This decision was subsequently affirmed by the United States Court of Appeals for the Sixth Circuit. In denying the Defendants' Motion for Summary Judgment, however, the Sixth Circuit did not reach the merits of this case. Rather, it held that the parties asserted disputed versions of fact, and therefore the court lacked jurisdiction to hear the appeal at that time. *See McKenna v. City of Royal Oak*, 469 F.3d 559 (6th Cir. 2006).

On July 12, 2007, Defendants filed a second Motion for Summary Judgment based upon new Sixth Circuit precedent that arose in the interim. On September 21, 2007, the District Court denied Defendants' second Motion for Summary Judgment. (App. C).

The only remaining Defendants, Officers Edgell and Honsowetz, went to trial regarding Plaintiff's § 1983 claim, which commenced on February 12, 2008. The trial concluded in a jury award in favor of Plaintiff for $6,000 in medical expenses and $275,000 for pain and suffering. Judgment was entered on March 4, 2008.

On March 18, 2004, Defendants filed their Motion for Judgment Notwithstanding the Verdict, Motion for New Trial, and Remittitur. On July 21, 2008, the District Court denied Defendants' Motion for Judgment

Notwithstanding the Verdict and New Trial, but granted Remittitur to reduce the unfounded amount of damages. (App. B). In so doing, Judge O'Meara asked the Sixth Circuit for clarification as to how law enforcement officers are to conduct themselves when faced with circumstances similar to those faced by Officers Honsowetz and Edgell in this case, given that this situation will likely appear again. The District Court filed an amended judgment on July 22, 2008, reducing the verdict from $281,000 down to $16,000, allotting $6,000 for medical expenses and $10,000 for pain and suffering.

Plaintiff filed a Motion for Reconsideration of the District Court's Opinion and Order granting remittitur on August 4, 2008, to which Defendants filed a Response on September 2, 2008. On September 5, 2008, the District Court denied Plaintiff's Motion for Reconsideration and affirmed the remittitur of damages. Plaintiff accepted the remittitur of $16,000 on September 15, 2008.

On August 14, 2008, Defendants filed their Notice of Appeal regarding the denial of their Motion for Judgment Notwithstanding the Verdict and New Trial. On October 3, 2008, Plaintiff filed his Notice of Appeal regarding the District Court's denial of Plaintiff's Motion for Reconsideration regarding Remittitur. The Sixth Circuit consolidated Defendants' Appeal regarding the denial of their Motion for Judgment Notwithstanding the Verdict and New Trial with Plaintiff's Cross-Appeal regarding the denial of Plaintiff's Motion for Reconsideration of Remittitur. On August 17, 2010, the Sixth Circuit affirmed the denial of summary judgment, directed verdict, and judgment notwithstanding the verdict, based on Defendants' qualified immunity claim. (App. A). It also

affirmed the reduction of damages. *See McKenna v. Edgell*, 617 F.3d 432 (6th Cir. 2010).

On August 31, 2010, Defendants filed a Petition for Rehearing *En Banc*, which was subsequently denied by Order of the Sixth Circuit on October 26, 2010. Defendants now petition this Honorable Court to grant a writ of certiorari to review the decision of the Sixth Circuit, filed on August 17, 2010.

SUMMARY OF THE ARGUMENT

The Fourth Amendment has not been implicated in this case. Implicit in the language of the Fourth Amendment is the notion that it applies to a limited purview of governmental conduct, *viz.*, it protects only against unreasonable searches and seizures. The Sixth Circuit, however, has improperly extended the Fourth Amendment to situations where law enforcement officers act as first responders to a medical emergency. Such expansion is antithetical to the plain language of the Fourth Amendment, Sixth Circuit jurisprudence, and this Court's jurisprudence.

Officers Edgell and Honsowetz, as well as law enforcement officers similarly situated, are entitled to qualified immunity when they are acting as first responders to a medical emergency. There is no "clearly established" law creating liability for law enforcement officers when they render medical assistance. Moreover, where, as here, reasonable minds disagree as to how the Officers should have conducted themselves under these circumstances, qualified immunity is warranted.

Further, an individual is not "seized" within the meaning of the Fourth Amendment where the individual is unconscious, in an altered state of consciousness, or otherwise unaware of the circumstances, and where no show of authority has been demonstrated or submitted to. Accordingly, Petitioners seek review of the Sixth Circuit's denial of qualified immunity and implication of the Fourth Amendment in the context of law enforcement officers acting as first responders to a medical emergency.

REASONS FOR GRANTING THE PETITION

The writ should be granted because the Sixth Circuit has decided important questions of federal law that have not been, but should be, decided by this Court. S.C.O.T.U.S. Rule 10(c). Specifically, the Sixth Circuit's ruling expands the Constitution well beyond its borders. Implicating the Fourth Amendment in this context is entirely at odds with this Court's jurisprudence regarding when a seizure has occurred.

Moreover, the Sixth Circuit's decision in this case profoundly disrupts the well-settled concepts of the doctrine of qualified immunity, as articulated by this Court. As explained in more detail, *infra*, the Sixth Circuit's ruling results in societal implications of constitutional proportion, and adversely affects law enforcement officers who are called in response to a medical emergency, as they often are in the course of their duties. This case presents the Court with a much-need opportunity to resolve the significant question, to wit: How are law enforcement officers, who are first responders to a medical emergency, to conduct themselves in order to avoid liability for a constitutional tort claim? The resolution of this question

will certainly have a long-standing effect that extends far beyond the parties to this case.

I. THIS COURT SHOULD CLARIFY THAT THE FOURTH AMENDMENT IS NOT IMPLICATED WHERE LAW ENFORCEMENT OFFICERS ARE ACTING AS FIRST RESPONDERS.

Fourth Amendment protection generally applies only to law enforcement conduct amounting to a search or a seizure. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968) ("[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons"). Implicit in the plain language of the Fourth Amendment is the notion that it applies to a limited purview of governmental conduct. In its ruling, however, the Sixth Circuit seemingly endeavors to expand the Fourth Amendment beyond its borders.

In *United States v. Attson*, the Ninth Circuit noted that "[o]nly rarely . . . has [this] Court considered the nature of fourth amendment restrictions on the conduct of government officials in noncriminal investigations." 900 F.2d 1427, 1430 (9th Cir. 1990) (*quoting The Supreme Court, 1986 Term -- Leading Cases*, 101 Harv. L. Rev. 119, 230 (1987)). The court went on to state:

> Even rarer are the instances in which the Court has considered the application of the fourth amendment to noncriminal *noninvestigatory* governmental conduct. Yet, when the Court has considered the application of the fourth amendment to governmental conduct in a noncriminal context, it has been careful to observe that the application of the amendment

> is limited. . . . [W]hile the reach of the fourth amendment has been extended to include various types of governmental conduct outside the traditionally recognized area of law enforcement, the Court has been careful to limit this expansion to governmental conduct that can reasonably be said to constitute a "search" or a "seizure" within the meaning of the fourth amendment. The types of non-law enforcement conduct to which the Court has extended the scope of the amendment are thus typically motivated by some sort of investigatory or administrative purpose designed to elicit a benefit for the government.

Attson, 900 F.2d at 1430 (emphasis in original).

The Sixth Circuit's decision in this case runs contrary to its earlier decision in *Peete v. Metropolitan Government of Nashville*, where it found that government employees providing medical care were not subject to the Fourth Amendment. 486 F.3d 217, 219 (6th Cir. 2007); *see also Mills v. Hall*, 2008 U.S. Dist. LEXIS 45054, *20 (E.D. Mich. 2008) (applying *Peete* to find that the defendant police officer "did not unreasonably seize [Plaintiff] for the purpose of interfering with his liberty. [He] responded to [a] call that [Plaintiff] . . . needed medical attention. [He was] not acting to enforce the law, deter, or incarcerate"); *Daniels v. Bowerman*, 2008 U.S. Dist. LEXIS 53421, *5-11 (E.D. Mich. 2008) (applying *Peete* in circumstances that were nearly identical to the situation in this case, with the exception that the *Daniels* plaintiff suffered severe and lasting injuries unlike Plaintiff here, to find that the plaintiff was not seized and the Fourth Amendment

did not apply). This trilogy of decisions is telling of how the Sixth Circuit erred in finding a Fourth Amendment violation here.

Officers Edgell and Honsowetz were not dispatched to Plaintiff's residence to investigate criminal conduct. The Officers arrived on the scene at the request of Plaintiff's daughter for the sole purpose of rendering medical assistance to Plaintiff. Their actions in administering medical aid were not "motivated by some sort of investigatory or administrative purpose designed to elicit a benefit for the government." *Attson*, 900 F.2d at 1430. Further, Plaintiff concedes that he was never arrested or given a citation, nor did he ever face criminal proceedings as a result of this incident. Instead, Plaintiff was transported to the hospital, treated, and released. Accordingly, there is simply no basis to find law enforcement conduct in this case.

Defendants also had ample justification for running Plaintiff's license number and for searching the bedroom and bathroom of Plaintiff's home. Officer Honsowetz explained at trial that he ran Plaintiff's license number solely for identification purposes.[1] With regard to the search of the bedroom and bathroom, the Officers were merely trying to determine the causal factor of Plaintiff's behavior. As noted by the District Court:

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1. Specifically, Officer Honsowetz testified that the firefighters needed Plaintiff's full name and date of birth for treatment, "so rather than go back up into the house and question [Plaintiff's] family," he "had them run what [he] believed was his vehicle in the driveway which would give [their] dispatch and [their] fire personnel the information they needed."

> [T]he search of McKenna's home was arguably reasonable since those attending to McKenna had no knowledge at the time what caused the seizure. . . . [I]t could have been precipitated by drugs or alcohol. . . . The court seriously doubts the officers intended to conduct a search of Plaintiff's bedroom and bathroom so they could later arrest him for illegal drugs. Instead, they were in the midst of a medical emergency that could be better addressed if Plaintiff's paramedics and doctors knew the cause of his seizure.

(App. B, p. 5). Additionally, Judge Rogers, in his dissenting opinion, explained:

> The officers' actions were more consistent with emergency medical response than with enforcing the law. . . . The officers' search of the bathroom cabinet and [Plaintiff]'s top dresser drawer was consistent with a search for medicines or illegal drugs that might explain [Plaintiff]'s condition. The officers did not search any locations unlikely to contain medicines or illegal drugs, and their choice to search the bedroom cabinet followed naturally from [Plaintiff's daughter]'s identification of that cabinet as the likely location of any medicines in the house.

(App. A, p. 26). It is apparent that the search was not conducted by the Officers for a criminal purpose and, criminal purpose aside, Plaintiff's medical condition supports the reasonableness of the search. *See Terry*, 392

U.S. at 9 (*quoting Elkins v. United States*, 364 U.S. 206, 222 (1960)) (emphasis added) ("[W]hat the Constitution forbids is not all searches and seizures, but *unreasonable* searches and seizures").

As previously noted, Plaintiff was never arrested, given a citation, or subjected to criminal proceedings. This, coupled with the fact that the Officers' actions were in accordance with their standard procedures and protocol for rendering medical assistance, reinforces that Plaintiff was not seized for a criminal purpose and that the Sixth Circuit erred in finding that the Fourth Amendment was implicated here. The elements of this case do not even rise to the level of an investigatory *Terry* stop, which does *not* implicate the Fourth Amendment. Accordingly, Defendants ask this Court to clarify that when government officials are acting as first responders to a medical emergency, they are not subject to a Fourth Amendment violation.

II. THIS COURT SHOULD CLARIFY THAT PETITIONERS, OFFICERS EDGELL AND HONSOWETZ, AS WELL AS LAW ENFORCEMENT OFFICERS SIMILARLY SITUATED, ARE ENTITLED TO QUALIFIED IMMUNITY WHEN THEY ARE RESPONDING TO A MEDICAL EMERGENCY AS FIRST RESPONDERS.

In promulgating the framework for determining whether qualified immunity is warranted, this Court has held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate

clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Stated otherwise, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). This Court has explained that this does not necessarily mean that official conduct is protected by qualified immunity unless the action has previously been held unlawful; rather, "it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In *Saucier v. Katz*, this Court enunciated a two-part test for determining whether a government official is entitled to qualified immunity. The first, threshold question asks, "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" 533 U.S. 194, 201 (2001). If answered in the negative, the inquiry is complete. *Id.* If, on the other hand, it is answered in the affirmative, the next step is to "ask whether the right was clearly established." *Id.*

Nearly eight years later, the Court reconsidered *Saucier* in *Pearson v. Callahan*, 129 S. Ct. 808 (2009). On reconsideration, the *Pearson* Court concluded that while the two-part test formulated in *Saucier* was often proper and beneficial, it was no longer regarded as mandatory. *Id.* at 818. Instead, the Court held that "judges . . . should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* Additionally, the *Pearson* Court also pronounced:

> Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.

Id. at 815 (citations and internal quotations omitted).

In conducting a qualified immunity analysis, this Court has cautioned against conducting a retrospective examination of an officer's discretionary functions. In *Graham v. Connor*, 490 U.S. 386, 396 (1989), this Court stated that the "reasonableness" of a particular action "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Moreover, this Court has held that immunity should be recognized "if officers of reasonable competence could disagree on th[e] issue. . . ." *Malley*, 475 U.S. at 341.

A. Officers Edgell and Honsowetz should be Afforded the Protection of Qualified Immunity insofar as there is no "Clearly Established Law" that Creates Liability for the Officers' Conduct as First Responders.

The Defendant Officers in the instant case were acting in a first responder capacity. There is no clearly established law that establishes that the Officers could

not restrain Plaintiff for his safety and for their own in the course of responding to a medical emergency call. The Sixth Circuit's denial of qualified immunity is diametrically opposed to case law directly on point from its own Circuit.

In *Peete*, the Sixth Circuit found that government employees acting as first responders to a medical emergency were entitled to qualified immunity. 486 F.3d at 217. The court premised its finding on the notion that medical aid does not constitute a "seizure" within the ambit of the Fourth Amendment. *Id.* Specifically, the Sixth Circuit declared:

> We find no case authority holding that paramedics answering a 911 emergency request for help engage in a Fourth Amendment "seizure" of the person when restraining the person while trying to render aid. Hence there is no "clearly established law" creating federal liability for a constitutional tort under these circumstances.[2]

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2. Interestingly, the Sixth Circuit "has emphasized that 'to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself.'" *Barrett v. Steubenville City Schs.*, 388 F.3d 967, 972 (6th Cir. 2004) (*quoting Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988)). Despite *Peete*'s clear declaration that there was no binding authority, the Sixth Circuit still came to the conclusion that the Officers here were not entitled to immunity. Insofar as the decision was a "newly enunciated standard," (App. A, p. 22 (Rogers, J., dissenting)), it logically follows that Officers Edgell and Honsowetz could not have violated a right, the contours of which were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640.

Id. at 219. Thus, the court granted qualified immunity to paramedics who "restrained [the decedent] 'by using their bodies to apply weight and pressure to [the decedent's] head, neck, shoulder, arms, torso and legs in an attempt to prevent the decedent from moving.'" *Id.* at 220. Courts within the Sixth Circuit have continued to apply *Peete* to immunize law enforcement officers rendering medical aid. *See, e.g., Daniels*, 2008 U.S. Dist. LEXIS 53421, at *10-12 (defendant police officers acting as first responders were entitled to qualified immunity); *Mills*, 2008 U.S. Dist. LEXIS 45054, at *20-22 (same).

Further corroborating Defendants' assertion that there is no clearly established law that creates liability for Officers' conduct as first responders, there was disagreement as to the proper conduct of a law enforcement officer acting as a first responder. At trial, the experts disagreed as to what was the appropriate conduct of the Officers, and as to the level of physical contact that should be made.[3] Similarly, in the Sixth Circuit Opinion, there was disagreement between the majority panel and the dissent. This demonstrates that qualified immunity is warranted. *Wilson v. Layne*, 526 U.S. 603, 618 (1999)

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3. Royal Oak firefighters and paramedics at the scene of the incident testified as to their protocol regarding persons in an altered state of consciousness, such as Plaintiff here. They explained that the proper procedure is to arouse such persons by means of physical contact, to restrain the person for the safety of themselves and others if necessary, and to look around for signs of drugs, alcohol, or other clues to provide insight into the person's behavior. Plaintiff's expert, conversely, testified that in dealing with a person who is having a seizure, the proper procedure is not to attempt to restrain the person, but rather to clear the surrounding area so the person does not hurt him or herself, and to let the seizure run its course.

("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy"); *Malley*, 475 U.S. at 341 ("[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized").

B. Allowing the Sixth Circuit's Ruling to Stand will Result in Societal Implications of Constitutional Proportion, and will Adversely Affect Law Enforcement Officers who are Called in Response to a Medical Emergency, as they Often are in the Course of their Duties.

The legal paradox faced by Officers Edgell and Honsowetz in this case is readily apparent. The Sixth Circuit's ruling stands for the proposition that if law enforcement officers apply any force, even in a first responder capacity, then they face liability for a Fourth Amendment violation. This is precisely what happened here. However, if Officers Edgell and Honsowetz had idly stood by and did nothing in the face of Plaintiff's serious medical needs, then they would have been subject to a claim of deliberate indifference. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 105-06 (1977).

In granting remittitur, the District Court stated:

> The difficulty of the jury's verdict is that ***it leaves law enforcement in a tenuous position***. On the one hand, Defendants' attempts to provide medical assistance have left them with a Fourth Amendment violation that found damages in excess of a quarter of a million dollars. On the other hand. what would have

> happened had the officers stood by and done nothing until paramedics arrived, or if the seizure was drug induced and the officers had failed to inform treating physicians of this potential issue because they failed to search for drugs? It is rather likely that Defendants would have face[d] a deliberate indifference claim.

(App. B, p. 3) (emphasis added). This unsettling "quandary" even left esteemed Judge O'Meara, graduate of Harvard Law School, uncertain as to how law enforcement officers are to conduct themselves in circumstances similar to those giving rise to this matter. Indeed, Judge O'Meara asked the Sixth Circuit for clarification: "In conclusion, this order sufficiently addresses the facts and issues of this case, however, ***it does not necessarily answer the greater question posed to this court: what exactly should the police do in a situation such as this?*** (App. B, p. 4) (emphasis added). Judge O'Meara also opined that, given the financial constraints of communities, this was not a unique case, and that it was "very likely this situation will appear again before this court and others." (App. B, p. 5).

Not only does this Catch-22 harm law enforcement officers who are held liable for a constitutional violation, but it also harms the general public. To the extent that law enforcement officers are not entitled to immunity, they are stripped of their professional discretion, which in turn handicaps them from fulfilling their official duties. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 167 (1992) ("[W]e have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering

public service. . . . In short, the qualified immunity recognized in *Harlow* acts to safeguard government, and thereby to protect the public at large, not to benefit its agents").

It must be recognized that in serving the public at large, "police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving. . . ." *Graham*, 490 U.S. at 397. To that end, courts must further acknowledge that law enforcement officers are not required to be "well-versed in the area of civil rights. . . . Civil rights is within the expertise of lawyers; policework is the expertise of policemen and policewomen." *Tompkins v. Frost*, 655 F. Supp. 468, 471(E.D. Mich. 1987).

The decision of the Sixth Circuit fails to provide guidance to law enforcement officers that are faced with the same or a similar situation, especially with regard to the point when officers cross the line from medical responders to law enforcement. *See Saucier*, 533 U.S. at 206 (stating that qualified immunity operates to protect law enforcement officers from the "sometimes hazy border" between what is acceptable and what is not). The court fails to delineate at what particular point the status of Officers Edgell and Honsowetz transformed from medical responder to law enforcement officer. It is undisputed that the Officers arrived on the scene in response to a 911 call, and that there was, indeed, a medical emergency. There is also no dispute that the Officers conducted themselves in the manner that they were trained when responding to a medical emergency. Consequently, it is unclear when the violation of a "clearly established" right occurred. Was it when the Officers restrained Plaintiff for his safety

and for their own? Was it when the Officers searched for clues regarding the origin of Plaintiff's behavior? Insofar as these actions were in accordance with the Officers' training in rendering medical aid, it is quite unclear at exactly what point the Officers' role crossed the "hazy border" from medical responders to law enforcement officers. Such undefined parameters of our Constitution should be explored before law enforcement officers are subjected to circumstances where they will inevitably face liability at every turn – a result the doctrine of qualified immunity sought to avoid. *See, e.g., Wright v. City of Canton*, 138 F. Supp. 2d 955, 961 (N.D. Ohio 2001) ("[T]he doctrine [of qualified immunity] gives state actors the freedom to perform their official duties without fear that even a slight misstep will trigger their financial ruin").

III. PLAINTIFF WAS NOT "SEIZED" WITHIN THE MEANING OF THE FOURTH AMENDMENT.

The test for determining whether a seizure occurs under the Fourth Amendment has been clearly articulated by this Court. In view of the totality of the circumstances, an individual has been seized if "a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Accordingly, a seizure occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry*, 392 U.S. at 20 n. 16.; *see also Bennett v. City of Eastpointe*, 410 F.3d 810, 821, 833 (6th Cir. 2005) (*citing California v. Hodari D.*, 499 U.S. 621, 626 (1991)) (a government official's demonstration of his enforcement authority is an essential component to what constitutes a seizure within the meaning of the Fourth Amendment).

Consistent with *Mendenhall* and *Terry*, the Sixth Circuit in *Peete* held that an unconscious individual was not seized within the meaning of the Fourth Amendment insofar as he "could not perceive any restraint on his liberty or otherwise feel compelled to submit to a governmental show of force." 486 U.S. at 221. The court in *Browell v. Davidson* came to the same conclusion, reasoning that the plaintiff did not recall any of the events involving the police leading up to her transport to the hospital, and the plaintiff was not aware of the presence of police or her ability to leave. 595 F. Supp. 2d 907, 916 (N.D. Ind. 2009); *see also Leaf v. Shelnutt*, 400 F.3d 1070, 1090 (7th Cir. 2005) ("If [the plaintiff]'s failure to flee can be attributed to the fact that he was asleep or otherwise unconscious, we think that it cannot be said that the officers terminated his freedom of movement through their show of authority").

The Sixth Circuit's finding of a Fourth Amendment violation in this case cannot be reconciled with *Mendenhall* and *Terry*, nor its own decision in *Peete*. Plaintiff has no recollection of the events that transpired on March 18, 2004. Plaintiff merely recalls going to bed the night before, and then waking up in the hospital. Moreover, the Officers did not demonstrate a show of authority at any point during the course of rendering medical aid to Plaintiff. They restrained Plaintiff for his safety and for their own, not for investigatory purposes.[4] Insofar as the Officers did not demonstrate a show of authority, it cannot be said that Plaintiff submitted to a show of authority. To that end, Plaintiff's liberty was never restrained, and application of

4. If it is Plaintiff's contention that the restraint was improper, then this is more akin to a claim of medical malpractice, which is not actionable under 42 U.S.C. § 1983.

the Fourth Amendment was never triggered. Consistent with *Mendenhall* and *Terry*, Defendants ask this Court to resolve the issue of whether an individual can be seized within the parameters of the Fourth Amendment where he or she is unconscious, in an altered state of consciousness, or otherwise unaware of the circumstances, and where no show of authority has been demonstrated or submitted to.

CONCLUSION

For the foregoing reasons, Petitioners, Officers B. Honsowetz and P. Egdell, respectfully request that this Honorable Court GRANT their Petition for Writ of Certiorari.

Respectfully submitted,

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